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## Lagi ak Alok v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO Q-05–42–02 OF 2013
ZAWAWI SALLEH, IDRUS HARUN AND ABDUL RAHMAN SEBLI JJCA
25 MARCH 2015

C

*Criminal Law — Appeal — Appeal against conviction and sentence — Appellant convicted and sentenced for offence of murder under s 302 of the Penal Code and offence of in possession of firearm under s 8(a) of the Arms Act 1960 — Whether shooting intentional — Whether there was struggle between appellant and deceased during incident — Whether appellant had intention to kill deceased — Whether deceased's wife competent witness — Whether evidence amply corroborated — Arms Act 1960 s 8(a) — Penal Code s 302*

D

*Evidence — Witness — Interested witness — Whether deceased's wife prohibited from giving evidence — Whether competence — Corroboration — Whether evidence of deceased's wife corroborated*

E

The appellant was convicted for the offence of murder under s 302 of the Penal Code ('the Code') and also for the offence of possession of firearm under s 8(a) of the Arms Act 1960 ('the Act'). The appellant accordingly was sentenced to death for the offence of murder and three years' imprisonment for the offence of possession of the firearm. The appellant appealed against the decision on the ground that, he had no intention of killing his elder brother by shooting and that the shotgun went off accidentally during a struggle for it between him and the deceased. The appellant thus sought to be convicted and sentenced on a reduced charge under s 304 of the Code. The appellant had also argued that PW3 ('the deceased's wife') was an interested party being the wife of the deceased and thus, her evidence ought to be viewed with suspicion and had to be corroborated by other evidence. On the other hand, the respondent's witness, PW3, who was also the only eyewitness of the incident, testified that there was no struggle and the shooting was intentional. There was a contradiction as to the evidence of the appellant and PW3 on the circumstances of the case during the incident. The appellant testified that the deceased was spraying weed killer during the incident whereas PW3 testified that the deceased was filling petrol into the fuel tank of the grass-cutter machine during the incident. The evidence of PW3 was supported by the testimony of the sister of both the appellant and the deceased, ('PW8') and Insp Mohd Fauzia bin Yaacob, ('PW10') who saw a fuel tank and a grass-cutter

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machine at the crime scene. The issue for determination was related to the circumstances of the death of the deceased and its consequences.

**Held,** dismissing the appeal and affirming the conviction and sentence by the High Court:

(1) The evidence of the pathologist ('PW11') which showed that there were no defensive injuries or other injuries associated with a physical fight sustained by the deceased, and that of PW10, that there were no struggling marks found on the ground where the incident occurred corroborated PW3's version of the incident that the appellant shot the deceased intentionally. Further, the armament officer ('PW9') testified that during a struggle for shotgun, chances of accidental pulling of the trigger was very low (see para 27).

(2) The failure of the defence to cross-examine the respondent's witnesses namely PW3, PW8 and PW10 went to the credibility of the appellant's testimony and indeed amounted to an acceptance of the respondent's witnesses' testimony that the deceased was filling petrol into the fuel tank of the grass-cutter machine during the incident. The learned trial judge was correct in law and in fact when His Lordship held that from the circumstantial evidence supporting the eyewitness PW3's evidence on the event, the appellant had the intention to kill the deceased with the shotgun and that the alleged accidental shooting could not and did not occur at all. Thus, the case against the appellant could not be brought under s 304(a) of the Code (see paras 18 & 32).

(3) There was no law which prohibited PW3, the wife of the deceased, an eye witness in this crime from giving her evidence. She was a competent witness who was at the scene of the occurrence and had seen the husband being murdered. She had given her evidence truthfully with consistency and without any exaggeration or embellishment. Thus, the court found that PW3's evidence was reliable and not tainted. In addition, PW3's evidence that the shooting was intentional, not accidental, was amply corroborated by the evidence of PW8, PW9, PW10 and PW11 (see paras 34–35).

(4) The conviction and sentence for the offence under s 8(a) of the Act may be upheld as it had become academic in any event since the appellant had already served the sentence of imprisonment of three years. Nevertheless, there was overwhelming evidence to prove that the appellant had in fact committed the offence under this section and therefore the conviction against and sentence imposed on the appellant were correct (see para 38).

**[Bahasa Malaysia summary**

Perayu disabitkan untuk kesalahan membunuh di bawah s 302 Kanun Keseksaan ('Kanun') dan juga kesalahan pemilikan senjata api di bawah s 8(a)

Akta Senjata Api 1960 ('Akta'). Perayu telah sewajarnya dihukum mati untuk kesalahan pembunuhan dan tiga tahun penjara untuk kesalahan pemilikan senjata api. Perayu merayu terhadap keputusan itu atas alasan bahawa, dia tidak mempunyai niat untuk membunuh dengan menembak dan bahawa senapang patah secara tidak sengaja dilepaskan sewaktu pergelutan antara dia dan si mati. Perayu oleh itu, memohon untuk pengurangan pertuduhan di bawah s 304 Kanun. Perayu juga menghujahkan bahawa PW3 ('isteri si mati') adalah pihak berkepentingan merupakan isteri si mati dan oleh itu, keterangannya perlu dinilai dengan syak dan disokong oleh keterangan lain. Di sebaliknya, saksi responden, PW3, yang juga merupakan satu-satunya saksi kejadian, memberi keterangan bahwa tiada pergelutan dan tembakan itu disengajakan. Terdapat percanggahan kepada keterangan perayu dan PW3 pada keadaam kes sewaktu kejadian. Perayu memberi keterangan bahawa si mati sedang menyembur racun rumpai sewaktu kejadian manakala PW3 memberi keterangan bahawa si mati sedang mengisi petrol ke dalam tangki minyak mesin pemotong rumput sewaktu kejadian. Keterangan PW3 disokong oleh testimoni saudara perempuan kedua perayu dan si mati, PW8 dan Insp Mohd Fauzia bin Yaacob ('PW10') yang nampak tangki minyak dan mesin pemotong rumput di tempat kejadian. Isu untuk penentuan adalah berkaitan dengan keadaan kematian si mati dan akibatnya.

**Diputuskan,** menolak rayuan dan mengesahkan sabitan dan hukuman oleh Mahkamah Tinggi:

(1) Keterangan patologi ('PW11') yang menunjukkan bahawa tiada kecederaan pertahanan atau kecederaan lain berkaitan dengan pergaduhan fizikal yang dialami oleh si mati, dan juga PW10, bahawa tiada tanda pergelutan didapati pada tempat kejadian berlaku disokong oleh versi kejadian PW3 dengan tempat kejadian bahawa perayu menembak si mati dengan sengaja. Tambahan lagi pegawai persenjataan ('PW9') memberi keterangan bahawa sewaktu pergelutan merebut senapang patah, kemungkinan untuk menarik picu dengan tidak sengaja adalah amat rendah (lihat perenggan 27).

(2) Kegagalan pembelaan untuk memeriksa balas saksi responden iaitu PW3, PW8 dan PW10 pergi ke kredibiliti testimoni perayu dan sesungguhnya dikira sebagai satu penerimaan testimoni responden bahawa si mati sedang mengisi petrol ke dalam tangki mesin pemotong rumput sewaktu kejadian. Hakim yang bijaksana adalah betul dalam undang-undang dan fakta apabila Yang Arif memutuskan bahawa daripada keterangan mengikut keadaan yang menyokong keterangan saksi PW3 pada kejadian, perayu mempunyai niat untuk membunuh si mati dengan senapang patah dan bahawa kejadian penembakan tidak sengaja yang dikatakan itu tidak boleh dan sama sekali tidak berlaku. Maka, kes terhadap perayu tidak boleh dibawa di bawah s 304(a) Kanun (lihat perenggan 18 & 32).

(3) Tiada undang-undang yang melarang PW3, isteri si mati, seorang saksi dalam jenayah ini daripada dia memberi keterangan. Dia adalah saksi yang kompeten yang berada di tempat berlaku kejadian dan telah menyaksikan suaminya dibunuh. Dia telah memberi keterangannya dengan benar dan konsisten dan tanpa apa-apa penambahan cerita atau penghuraian lebih lanjut. Oleh itu, mahkamah mendapati bahawa keterangan PW3 adalah boleh dipercayai dan tidak tercemar. Tambahan lagi, keterangan PW3 bahawa tembakan itu adalah disengajakan, bukan kemalangan, adalah cukup disokong oleh keterangan PW8, PW9, PW10 dan PW11 (lihat perenggan 34–35).

(4) Sabitan dan hukuman untuk kesalahan di bawah s 8 Akta boleh didukung kerana ia telah menjadi akademik dalam apa-apa keadaan memandangkan perayu telah pun menjalani hukuman penjara selama tiga tahun. Walau bagaimanapun, terdapat keterangan yang amat jelas bahawa perayu ternyata telah melakukan kesalahan di bawah seksyen ini dan oleh itu sabitan dan hukuman yang dikenakan adalah betul (lihat perenggan 38).]

**Notes**

For cases on appeal against conviction and sentence, see 4(1) *Mallal's Digest* (5th Ed, 2015) paras 42–83.

For cases on interested witness, see 7(3) *Mallal's Digest* (5th Ed, 2015) paras 3560–3576.

**Cases referred to**

*Dato' Yap Peng v PP* [1993] 1 MLJ 337, HC (refd)
*Liow Siow Long v PP* [1970] 1 MLJ 40 (refd)
*Nasaruddin bin Daud & Anor v PP and another appeal* [2010] 6 MLJ 35; [2010] 8 CLJ 21, CA (refd)
*PP v Mohamed Kassim bin Yatim* [1977] 1 MLJ 64 (refd)
*PP v Munusamy* [1980] 2 MLJ 133 (refd)
*PP v Vijaya Raj* [1981] 1 MLJ 43 (refd)
*Timhar Jimdani Ong & Anor v PP* [2010] 1 MLJ 775; [2010] 3 CLJ 938, CA (refd)
*Wong Swee Chin v PP* [1981] 1 MLJ 212, FC (refd)

**Legislation referred to**

Arms Act 1960 s 8(a)
Penal Code ss 302, 304(a)

**Appeal from:** Criminal Trial Nos 45–01 of 2008(BTU) and 45–03 of 2008(BTU) (High Court, Bintulu)

*Ranbir Singh Sangha (Ranbir S Sangha & Co) for the appellant.*

*Nahra bt Dollah (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.*

**Idrus Harun JCA:**

FACTUAL BACKGROUND

**[1]** The appellant in this case was convicted of an offence of murder under s 302 of the Penal Code ('the PC') and an offence of possession of a firearm under s 8(a) of the Arms Act 1960 ('Act 206'). He was accordingly sentenced to death for the offence of murder and three years imprisonment for the offence of possession of the firearm. The appellant appealed against both orders of conviction and sentence for both offences.

**[2]** The charges against the appellant under s 302 of the PC and s 8(a) of Act 206 respectively are in the following terms:

> That you, on 4th day of June, 2007, between 8.30 a.m. and 9.00 a.m. at Kebun Logan in the vicinity of Ng Setusur, Tatau, in the District of Tatau, in the State of Sarawak, did commit murder by causing the death of one Sait Anak Alok (M), and that you have thereby committed an offence punishable under section 302 of the Penal Code; and
>
> That you, on 4*th* day of June, 2007, between 8.30 a.m. and 9.00 a.m. at Kebun Logan in the vicinity of Ng Setusur, Tatau, in the District of Tatau, in the State of Sarawak did have in your possession of a firearm, to wit, a shotgun SBBL 12 bore Shotgun 'Johnson' No. 52312C1, and that you are thereby committed an offence punishable under section 8(a) of the Arms Act 1960.

The two charges were tried jointly.

**[3]** The case unravelled when on that fateful day, before the upcoming incident, around 6.30 in the morning of 4 June 2007, the appellant, who came to the deceased's house at Rumah Setang, Nengah Setusur, Tatau had asked the deceased whether he could tap rubber trees under his care but was disallowed by the deceased, as previously, according to the deceased's wife Rinie ak Nuing ('PW3'), when the appellant was allowed to tap rubber, the rubber trees died as he had tapped the trees twice a day. The deceased raised his voice and shouted at the appellant when he did not allow the appellant to tap rubber. The appellant remained silent and left the house.

**[4]** Thereafter, the deceased, PW3 and their six year old son left their house for their longan orchard or longan garden situated across a river namely Sungai Anap reaching there around 8am. PW3's testimony showed that the deceased brought a grass-cutter as he wanted 'to clear the tall grasses'. They did not carry

any *parang* or any other garden implements. PW3 on her part brought only food and drink.

**[5]** Upon reaching the longan garden, PW3 and her son sat on a piece of plank affixed along the edge of the veranda portion of their small farm shack which was about two paces away from where the deceased was filling some petrol into the fuel tank of the grass-cutter machine. The deceased was on a slightly sloped portion of the ground. While the deceased was filling up the fuel tank of the grass-cutter machine with petrol, suddenly the appellant appeared from a pathway which was partially covered with bushes. The appellant carried a shotgun and *parang* which was inside a sheath tied to his waist. Before the court, PW3 re-enacted the appellant's body gestures at that relevant time, showing a person standing erect, all tensed up as if anxious for a fight. She demonstrated how the appellant at that time held the shotgun with both hands pointing it at the deceased, catching him by surprise.

**[6]** As she related the incident further, PW3 told the court that when the appellant came charging towards the deceased, he loudly said to the deceased in Iban dialect, 'Nama dik ka amat ngelaban aku, ka amat dik nganu aku, nama dik ka mati?' which when translated into English means, 'why you always want to pick up a fight with me, you always scold me, you want to die?' The deceased, caught by surprise, immediately stood up, raised both his hands and said in Iban dialect, 'Anang' which means 'Don't'. He could only utter that word when the appellant fired a shot at the deceased who was two paces away from the nozzle of the shotgun. The shot caused the deceased to slump onto the ground in a sitting position. PW3 testified that her husband then said, 'mati aku padah ka orang' which means 'I am dying, tell the people'. She then saw the deceased lying down tossing left and right holding with both hands the protruding portion of his intestine. The deceased rolled over down the slope where he finally rested on a rock. PW3's evidence showed that the incident happened very fast, about two or three minutes from the time the appellant came until the time he shot the appellant.

**[7]** After the deceased's body finally rested on the rock, PW3 testified, the appellant while holding the shotgun in one hand, pulled the parang from its sheath with another hand and swung it towards PW3 saying loudly, 'Nuang anang ngelaban aku, entik ngelaban aku bunuh aku di' which means 'You don't fight with me. If you fight with me I will kill you'. However, PW3 did not get hit by the parang as she squatted in a surrender gesture, raising both her hands half-way up, crying and pleading 'Don't kill me. I am your sister in law'. The appellant then said 'Lari aku' and he ran off into the same direction he came in, carrying the shotgun and the *parang* with him.

**[8]** PW3 subsequently left the scene. However, at Sungai Anap she bumped

into the appellant who in loud voice warned her not to tell others. If she told others, he would shoot her. PW3 and her son went to PW8's house and related the incident to her. Together both PW3 and PW8 went to Rumah Setang where they told the long house folks about the incident. PW3 and the long house folks thereupon proceeded to the scene of the crime and on arrival they saw the deceased's body then already dead with the face down and still rested on the rock. A police report was lodged.

**[9]** Meanwhile, on the same day after the incident, Sauwang Ak Santap ('PW2') of Rumah Setang, Nengah Setusul, Tatau, who at the material time was in Sibu, was asked to return by the Tuai Rumah of Rumah Setang through radio announcement. The Tuai Rumah told PW2 that his shotgun was used in a killing. When he returned to the long house Rumah Setang from Sibu, PW2 discovered that his shotgun was missing with the door to his bedroom where the shotgun was kept and which he had earlier locked using a padlock, was forced open. PW2 identified the shotgun ('exh P4'), as his. PW2 further testified that the appellant at the relevant time lived in a house which was two houses away from his house unconnected to the long house but under one Tuai Rumah. Sio ak Alok ('PW8'), the sister of both the appellant and the deceased testified that the appellant lived with his other brother Lapik whose house was in the same locality as Rumah Setang under the same Tuai Rumah.

**[10]** On 12 June 2007, the appellant was arrested at Mesama Camp, Tatau by a team of policemen led by PW16. The shotgun was recovered on 14 June 2007 after the appellant led the police to the logging truck road of Gabung Camp B in the front junction of Bekasih Ulu Anap, Tatau where it was found.

THE APPEAL

**[11]** The appellant set out 25 grounds of appeal in his petition of appeal. However, in the course of the appeal, and as was clearly stated in the appellant's revised written submission, the appellant proceeded on grounds 15–20, 22 and 23 only and abandoned grounds 1–14. Based on these eight grounds, the appellant's defence in essence was that the appellant had no intention of killing his elder brother by the shooting and that the shotgun went off accidentally during a struggle for it between him and the deceased.

**[12]** At the outset we feel necessary to set out the essential elements of the offence under s 302 of the PC which the prosecution has to establish, and so far as it relates to the charge against the appellant, these are:

(a) Sait ak Alok died;

(b) he died as a result of the injury sustained by him and that the injury sustained by him was inflicted by or the result of the act of the appellant; and

(c) the appellant had caused such injury:

(i) with the intention of causing the deceased's death;

(ii) with the intention of causing such bodily injury as the appellant knew to be likely to cause death; or

(iii) with the intention of causing bodily injury and such bodily injury intended or inflicted was sufficient in the ordinary course of nature to cause death.

OUR ANALYSIS AND FINDINGS

**[13]** The appellant admitted to causing injury to the deceased resulting in his death with the shotgun (exh P4) except the circumstances of the death. He had also admitted that he brought the said shotgun with him to the longan garden on the day in question. PW11, the consultant pathologist with Kuching General Hospital, confirmed the death of the deceased was due to the gunshot wound at the abdomen penetrating the aorta. The body of the deceased was identified by the wife of the deceased, PW3. The same shotgun, through the evidence of PW9 ASP Zaidi bin Sait who was the armament officer, was proven to be serviceable. Based on this evidence, we are satisfied that the essential elements in sub-paras (a) and (b) above had been established conclusively by the prosecution and in any event, this was not disputed by the defence.

**[14]** The main thrust of the defence in our view appears to be confined solely to the third ingredient of the offence in para (c). In other words, the issue for determination in this appeal is one that relates to the circumstances of the death of the deceased and its consequences. We were indeed pressed with the defence argument that in its view, the circumstances of the case would justify the appellant to be entitled to be convicted on a reduced charge, at the very least, one that was punishable under s 304(a) of the PC. The reasoning was premised, as we understand it, on the appellant's assertion that the appellant accidentally pulled the trigger during the struggle for the shotgun between the appellant and the deceased.

**[15]** It was argued that the aforesaid line of defence was supported by the evidence of the prosecution's own witnesses namely PW3 and the pathologist, ('PW11'), as well as the appellant's cautioned statement ('exh D1').

**[16]** From the witness stand, the appellant unravelled his own version of the case explaining the cause of the victim's death when he testified that in the early

morning of 4 June 2007 he went to longan garden, apparently referring to the place where his brother was, at about 8.30am fatally injured by the gunshot. He went to the longan garden just to see it as he also had a share in the longan garden and he did not know the deceased was there. He did not intend to tap rubber that morning after the quarrel with Rinie PW3 which had occurred in the said morning. Earlier in his evidence the appellant testified that PW3 did not like him to tap rubber and that he had done so previously, therefore he should not do it again for fear that it might kill the rubber trees. The appellant further testified that the deceased told him not to tap rubber that morning, only his wife could do so, and that the rubber garden belonged to him. We agree with the learned judge's finding that the appellant's testimony in this regard appears to be substantially consistent with the evidence of his sister in law PW3. The only difference however, lies in the fact that in PW3's testimony, it was the deceased, not PW3, who told the appellant in loud voice that he could not tap rubber in that fateful morning. The quarrel was, in fact between the appellant and the deceased. It is important to note that PW3 was never cross-examined on the appellant's evidence that she did not allow him to tap rubber and that he had a quarrel with her in the morning of 4 June 2007.

**[17]** The appellant had also admitted to carrying the shotgun which he had loaded on the way to longan garden but denied that he intended to shoot anybody. On arrival, the appellant saw the deceased, PW3 and their three children. The deceased then was spraying the grass with weed killer and the appellant did not see any grass-cutter machine. We need only say on this aspect of the defence evidence that though PW3 was asked by learned defence counsel that she and the deceased only wanted to spray the grass that day, PW3 disagreed and went on to testify that her husband only wanted to cut the grass using the grass-cutter. The learned trial judge in rejecting the appellant's evidence correctly stated that the defence failed to specifically put to PW3 that upon the appellant's arrival at the longan garden the deceased was standing up spraying the grass with weed killer. The failure to put to PW3 the said line of defence itself had cast suspicion on the appellant's allegation that the deceased was then spraying the grass with weed killer. It may be recalled that PW3's undisputed evidence showed that at that time she and her son were merely about two paces away (which was about six feet) from where the deceased then was. The weed killer being highly poisonous and thus hazardous, the learned judge correctly inferred and we have no reason to disagree, that logically it would have been unlikely that the deceased would have sprayed the vicinity for fear that the weed killer spray might somehow reach his wife and child therefore would adversely affect them.

**[18]** There is moreover the evidence of PW8 related to this matter which was not considered by the learned judge. According to PW8, she went to the longan garden with PW3 and other long house folks upon being informed about the

incident by PW3. When she was cross-examined by learned defence counsel, she said that she saw the grass-cutter and the fuel container was near the grass-cutter. The defence never suggested to PW8 that the weed killer spray was at the scene of crime. This evidence lent support to PW3's evidence that the deceased was filling petrol into the fuel tank of the grass-cutter machine and thus completely destroyed the appellant's evidence that the deceased was spraying weed killer at longan garden. In our view, PW8 in this regard had no reason to lie. She was a wholly disinterested witness being the sister of both the appellant and the deceased.

**[19]** The evidence of PW3 and PW8 in respect of the grass-cutter was further corroborated by PW10, Insp Mohd Fauzia bin Yaacob, who went to the scene of crime after being informed of the incident when he confirmed that he saw one grass-cutter and a fuel tank. But he did not seize it as at that relevant time he thought that it was not relevant. We would say that the evidence of PW8 and PW10 had further fortified the finding made by the learned judge that the failure to put the line of defence to PW3 had cast suspicion on the appellant's allegation that the deceased was spraying the grass with the weed killer. It would not, perhaps be incredible to say that the appellant's evidence in this regard was indeed a figment of his own imagination.

**[20]** Reverting to the incident in the morning of 4 June 2007, the accused said that when he arrived at the longan garden, he told the deceased to stop spraying the grass and that he had a share in the longan garden and yet he did not have a say in the longan garden. According to the appellant, the deceased became angry and said something in loud voice which he, however, could not remember. The deceased then put down the spray, approached the appellant, said something which we observe the appellant once again could not remember, grabbed the barrel of the shotgun from the appellant and in the ensuing struggle the appellant accidentally pulled the trigger. The appellant's obvious failed memory of what the deceased had allegedly said during the incident did not escape the learned judge's attention when His Lordship aptly commented upon it and made a finding as follows:

> It seems unbelievable the accused could not remember a word of what his brother Sait had allegedly angrily uttered prior to his purported grabbing of the nozzle of the shotgun, whereby a struggle and/or fight allegedly ensued between them — ending up in an event which must have for sometime thereafter dominated his mind — the death of his brother. And yet the accused in his testimony could remember less dominant event about his brother and PW3 disapproving of him tapping the rubber trees. The highly probable, if not irresistible, inference that could be drawn here would appear to be that, consistent with the testimony of the eyewitness PW3, prior to the discharge of the shotgun, Sait never had a chance to utter any word except, 'Anang'. That is why the accused could not remember anything of what the deceased had allegedly uttered prior to the alleged struggle for the shotgun — there was no utterance, no word to remember as the event never happened.

**[21]** We are entirely in agreement with the inference in the above excerpt as it was made after His Lordship had carefully considered the evidence.

**[22]** The appellant, we would observe, contradicted every point in PW3's evidence. He even demonstrated in court the manner in which he carried the shotgun. However, PW3 having demonstrated in court how the appellant carried the shotgun at the material time, naturally it would be logical and obligatory for the defence to challenge PW3 by putting forward the appellant's version during cross-examination of this witness. This, the defence had yet again failed to do thus rendering the appellant's testimony on this point wholly unmeritorious and as the learned judge had rightly said, unacceptable. It was also the appellant's case that the deceased attacked the appellant and started the fight and that while grabbing the shotgun he also punched the appellant. The learned judge, in our view, rightly rejected this line of defence as it was never put to PW3 that such attack occurred.

**[23]** The evidence of the appellant had also revealed that he had loaded the shotgun while on his way to the longan garden. This evidence, considered in light of the incident in the early morning when he was scolded by the deceased and the fact that the appellant lied when he said he took the shotgun from PW2's temporary shelter, not by forcing open the door to PW2's bedroom in the long house, showed his clear intention of his visit to the longan garden. The visit in fact was not just the visit to see it but it was the visit, to borrow the words of the learned judge, 'to let out his pent-up anger against the deceased'.

**[24]** Learned counsel had also contended that PW11's testimony during cross-examination about how the deceased sustained the gunshot injury supported the appellant's version of the struggle between him and the deceased. To support his argument, learned counsel relied on the evidence of PW11 which was elicited during cross-examination as follows:

| | |
|---|---|
| Q: | Is it possible that the victim could be holding the gun? |
| A: | Yes. |
| Q: | So it could (be) a case of the victim and 'gunman' struggling from the gun when the gun was discharged? |
| A: | Yes. It is possible. |

**[25]** PW11's evidence, learned counsel submitted, had destroyed the credibility of PW3 in that PW11's evidence and explanation showed that the incident could not have happened in the manner that PW3 said it did. We would, in connection with this argument, say that PW11 was the pathologist, and unlike PW3, he was not an eyewitness who was at the scene of crime. He gave his evidence offering his opinions on the cause of death. He quite honestly

admitted that he was not an expert in firearms and in fact when he was questioned why he did not examine the trajectory of the wound PW11 replied 'Not my expertise'. In view of this admission, his answers to the defence line of questioning would be merely an expression of opinion which in our judgment is not sufficiently useful, or of any assistance to the defence case as would cast a reasonable doubt in the prosecution case. In any event, evidence of experts can never go beyond an opinion and can never therefore be of absolute certainty (see *Public Prosecutor v Mohamed Kassim bin Yatim* [1977] 1 MLJ 64).

**[26]** The High Court had dealt with every single version of the defence in great details including the appellant's evidence that PW3 screamed after the gun went off which appeared to have corroborated PW3's testimony that she screamed and cried after the shotgun was discharged and saw her husband falling to the ground. This evidence, according to the learned judge, fit logically and naturally into PW3's description of the incident. We entirely agree with His Lordship's finding that based on PW3's testimony of the incident, quite clearly between the time the appellant emerged and uttered some angry words at the deceased to the time the deceased uttered 'Anang' which was immediately followed by the firing of the shotgun, there was nothing substantial that could evoke a scream except possibly the momentary pointing of the shotgun at the appellant, then there was the element of being stunned by the sudden appearance of the appellant armed with the shotgun, but most significantly the speed at which the incident occurred. If the struggle did actually take place, naturally and in all probability, on seeing the two of them struggling or fighting for the shotgun, PW3 would have let out frightened or otherwise angry scream. However, according to the appellant for the period of less than three minutes of the struggle PW3 did not scream at all. She only screamed and cried after her husband was shot. For these reasons, we do not find any fault in His Lordship's reasoning and finding that the alleged struggle or fight for the shotgun could not be true.

**[27]** Furthermore, the evidence of PW11 which showed that there were no defensive injuries or other injuries associated with a physical fight sustained by the deceased, and that of PW10, that there were no struggling marks found on the ground where the incident occurred corroborated PW3's version of the incident that the appellant shot the deceased intentionally. Moreover, PW9 testified that during a struggle for a shotgun, chances of accidental cocking and accidental pulling of the trigger was very low. He had also testified that it was very unlikely that the shotgun went off accidentally during a struggle for it unless it had been cocked. Under the circumstances, the credibility of the appellant's testimony on the circumstances leading to the alleged accidental shooting was greatly in doubt. The evidence of PW10 and PW11 in this connection, as the learned judge had correctly stated, was supportive of PW3's

evidence that when the deceased rose with both hands raised, immediately after he uttered the word 'Anang' the appellant fired the shotgun at the deceased.

**[28]** A question had arisen in consequence of PW3's demonstration in court during cross-examination on how the appellant held the shotgun, that if the appellant were to hold the shotgun the way PW3 described, the deceased would have been hit above his navel or in the chest. This question was put to PW3 when she demonstrated during cross-examination, an action of holding a gun with both hands at shoulder height and pointing it straight towards a target (presumably the deceased). In our judgment, this line of questioning obviously would be merely an attempt by the defence seeking to show that PW3's evidence that the deceased was shot by the appellant deliberately could not be true, and that the appellant's version was more probable. We are mindful that the evidence of PW3 and PW11 showed that the deceased was shot at the abdomen near the navel. In this regard, at the time PW3 witnessed the incident she was seated on a piece of plank at the small hut which, according to the learned judge, based on the photographs, appeared to be located on a higher ground. His Lordship further found that in all probability, PW3 was on a higher spot vis a vis the respective spots where the deceased and the appellant were and this, coupled with the probability that the appellant was standing on a slightly lower part of the slope vis a vis the deceased, could have made it appear to PW3 that the accused was pointing the shotgun straight at the deceased at shoulder level particularly when the deceased was squatting while in the process of filling fuel into the grass cutter machine. It may be recalled that according to PW3, the deceased stood up with his hands raised and thus in the process, we would say that the scenario obviously would change with the shotgun no more pointing at the shoulder.

**[29]** The learned judge pointed out that based on PW3's testimony, it was at the time when the deceased raised his body from the squatting position that the gun went off. The appellant must have pointed the shotgun at a point slightly higher than the navel, but the trigger was pulled when the deceased had raised his body from the squatting position. That, according to His Lordship, would explain why the deceased was shot, not at the chest or above the navel but instead on the abdomen near the navel. Upon careful perusal of the evidence, we are satisfied that, His Lordship's finding that the appellant was standing on a slightly lower part of the slope was amply supported by PW3's testimony that after the deceased was shot, he rolled over down the slope where his body finally rested on the rock, indicating that the deceased was on a higher level of the slope. The learned judge had found, and without doubt correctly that, in all the circumstances, the testimony of PW3, PW9, PW10 and PW11 inevitably pointed towards a scenario whereby there was no struggle at all prior to the pulling of the trigger of the shotgun. The learned judge therefore did not misdirect himself when His Lordship found that the appellant must have

cocked the shotgun and thereafter pulled the trigger thereby discharging the shot causing the injury to which his brother had succumbed to death.

**[30]** There remains the question of the appellant's cautioned statement which learned counsel for the appellant had urged this court to consider contending that it was consistent with the appellant's oral testimony when he confessed to shooting the deceased in the stomach accidentally. The learned judge, we observe, did not address the issue of the appellant's cautioned statement. It thus becomes necessary for us to address this issue now that the defence had raised it. Our reading of the cautioned statement revealed that the appellant did admit to shooting the deceased in the stomach accidentally when the deceased was trying to grab the gun from him. However, the appellant had also said the following:

> Satelah saya sampai saya terus berjumpa dengan abang saya dan kami ada bercakap cakap dan kemudian bertengkar. *Saya bertengkar dengan abang saya dan marah kepadanya kenapa tidak benarkan saya usahakan kebun getah yang lebih kurang 2 ekar.* Dalam keadaan yang tidak diduga abang saya ingin merampas senapang daripada saya. Kami berdua berebut rebut dan ketika itu saya tidak sengaja tertembak abang saya di perut.

His statement obviously differs from his testimony, indicating different motives for the shooting when he testified:

> I asked Sait to go back to stop spraying the grass. I told him that I have a share in this longan garden, and yet I don't have a say in the longan garden.

There is moreover his statement at the beginning of the cautioned statement which learned counsel chose not to highlight but in our view is manifestly relevant. He said:

> Saya sering dimarahi oleh abang saya kerana saya baru saja keluar penjara kerana kesalahan jenayah. Dan juga kerana saya sendiri tiada kad pengenalan diri. *Oleh kerana sering diherdik oleh abang saya, saya berasa tertekan dan kerana itu saya tembak abang saya dengan senapang*.

**[31]** We should have no hesitation to hold that this statement is a clear admission by the appellant that he shot the deceased deliberately. That would undoubtedly be so if not for the fact that in the latter part of the cautioned statement as shown above, he had also said the shooting was accidental but without retracting his earlier statement of his deliberate shooting of the deceased. Thus, if it could be argued by the defence that this statement was consistent with the appellant's testimony, the earlier part of his statement on the other hand clearly corroborated PW3's version that the appellant shot the deceased intentionally. These material contradictions, in our judgment, undoubtedly shows that the appellant is not a truthful witness and as such it is

wholly unsafe to give any weight to the cautioned statement. The defence submission on the cautioned statement is devoid of any merit and therefore must be rejected. Under the circumstances, the defence submission that the cautioned statement corroborated PW11's evidence in cross-examination is untenable. In any event, for the reasons that we have given a moment ago, PW11's testimony during cross-examination in this connection offers no assistance to the defence and does not in any way raise any reasonable doubt in the prosecution case.

**[32]** We have considered the evidence of the prosecution and the defence in its entirety. Our careful and critical analysis of the evidence has exposed the trail of lies that the appellant had cooked up in his evidence as well as during cross-examination of the prosecution witnesses which was explicitly characterised with contradictions, series of failures to put and suggest to the prosecution witnesses on the material and crucial aspect of the defence case as well as his feeble attempts at contradicting almost every point of PW3's testimony, the eyewitness to the crime which the defence hoped to get the case decided in its favour. On the failure of the defence to cross-examine several prosecution witnesses namely PW3, PW8 and PW10 as we have highlighted earlier in this judgment, we should say that such failure goes to the credibility of the appellant's testimony and indeed amounts to an acceptance of the prosecution witnesses' testimony (see *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212 (FC)). We are fully convinced that the learned judge's conclusion was correct in law and in fact when His Lordship held that from the circumstantial evidence supporting the eyewitness PW3's evidence on the event, the appellant had the intention to kill the deceased with the shotgun and that the alleged accidental shooting could not and did not occur at all. The learned judge had rightly rejected the defence version that the shotgun went off accidentally and fatally wounded the abdomen penetrating the aorta during the struggle between the appellant and the deceased. We, therefore, cannot accede to the argument urged for the appellant that the case against the appellant could be brought under s 304(a) of the PC.

**[33]** In arriving at the said finding, the learned judge had carefully appraised every single version of the defence in minute details in relation to the prosecution's version of the case through PW2, PW3, PW8, PW9, PW10 and PW11.

**[34]** As regards the acceptance of PW3's testimony by the learned judge, the defence argument that she was an interested party being the wife of the deceased and thus her evidence ought to be viewed with suspicion and had to be corroborated by other evidence. Suffice for us to say that there is no law which prohibits PW3, the wife of the deceased an eye witness in this crime from giving her evidence. She was a competent witness who was at the scene of

A the occurrence and had seen the husband being murdered. She had given her evidence truthfully with consistency and without any exaggeration or embellishment. Her evidence remained unshaken throughout especially during severe cross-examination by learned counsel. In *Liow Siow Long v Public Prosecutor* [1970] 1 MLJ 40, Raja Azlan Shah J had articulated the assessment
B of the credibility of family or friends of parties to proceedings and their probative value in the following words:

> It is difficult to accept the suggestion that if a witness is shown to be a relation of the accused, his evidence is tainted. Testimony of close relations is not tainted if it is
C otherwise reliable in the sense that the witnesses are competent witnesses who were at the scene of the occurrence and could have seen what had happened.

**[35]** We would add on this aspect that the credibility of the evidence of such witnesses and its probative value is dependant on whether or not the court finds
D such witnesses to be entirely disinterested witnesses and otherwise reliable. Thus, if it is found that such witnesses show bias towards either party, then the court would require corroboration if such evidence is to be acted upon (see Public Prosecutor v Maksa bin Tohaiee at p 305 quoted in *Practitioners' Library, Evidence In Criminal Trials,* 2002 Lexis Nexis). We agree with the prosecution
E that PW3's evidence was reliable and not tainted. She was at the scene of the occurrence and had given evidence on what she had witnessed. There is absolutely no evidence to show that she was in any way bias towards the appellant. The learned judge found that PW3's testimony of the incident constituted the true version. In any event, PW3's evidence that the shooting
F was intentional, not accidental, was amply corroborated by the evidence of PW8, PW9, PW10 and PW11.

**[36]** The case, we must say, was decided on the findings of facts made by the learned judge. This court will not interfere with the findings of facts by the
G court of the first instance unless it can be shown that such findings suffer from some serious errors, or are against the weight of evidence or unless we can find substantial or compelling reasons for disagreeing with that finding (see *Dato' Yap Peng v Public Prosecutor* [1993] 1 MLJ 337; *Public Prosecutor v Munusamy* [1980] 2 MLJ 133; *Public Prosecutor v Vijaya Raj* [1981] 1 MLJ 43; *Timhar*
H *Jimdani Ong & Anor v Public Prosecutor* [2010] 1 MLJ 775; [2010] 3 CLJ 938; *Nasaruddin bin Daud & Anor v Public Prosecutor and another appeal* [2010] 6 MLJ 35; [2010] 8 CLJ 21).

CONCLUSION

I

**[37]** We see no reason to disturb the factual findings of the learned trial judge. In all the circumstances and based on the foregoing reasons, we accordingly at the conclusion of this appeal come to the inevitable decision that the prosecution case against the appellant had been proved beyond a reasonable

doubt. We therefore dismiss the appeal and affirm the conviction and sentence by the High Court against the appellant on the charge under s 302 of the PC.

**[38]** As regards the appeal against the appellant's conviction and sentence by the High Court for the offence under s 8(a) of Act 206, we agree with learned defence counsel in his revised submission that the conviction and sentence may be upheld as it had become academic in any event since the appellant had already served the sentence of imprisonment of three years. We, nevertheless, would like to emphasise that there was overwhelming evidence to prove that the appellant had in fact committed the offence under this section and therefore the conviction against and the sentence imposed on the appellant were correct.

*Appeal dismissed and the conviction and sentence by the High Court affirmed.*

Reported by Dzulqarnain Ab Fatar